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IN THE
SUPREME COURT OF THE UNITED STATES

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CAREN CRANK THOMAS AND WINDY CITY HEMP DEVELOPMENT BOARD,

Petitioners,

-v.-

CHICAGO PARK DISTRICT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* CITY OF NEW YORK, IN SUPPORT OF RESPONDENT

MICHAEL D. HESS,
Corporation Counsel
Attorney for the *Amicus Curiae* City of New York
100 Church Street
New York, NY 10007
(212) 788-1026 or 1010

LEONARD J. KOERNER,*
ELIZABETH I. FREEDMAN,
VIRGINIA WATERS,
of Counsel.

*Counsel of Record

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BRIEF OF *AMICUS CURIAE* CITY OF NEW YORK, IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICUS CURIAE*

The City of New York ("the City") respectfully submits this brief in support of affirmance of the judgment of the United States Court of Appeals for the Seventh Circuit in Thomas v. Chicago Park District, 227 F.3d 921 (7th Cir.), reh'g and reh'g en banc denied, 2000 U.S. App. Lexis 28935 (7th Cir. 2000), cert. granted, __U.S.__, 121 S.Ct. 2191 (2001).[1]

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[1] Pursuant to Rule 37.6 of this Court, the *amicus curiae* represents that counsel for *amicus* authored this brief in its entirety and that no person or entity other than the *amicus* and its representatives made

The City has significant interests in this case, involving the constitutionality of permit regulations governing the use of parks and public spaces for demonstrations, rallies, and special events. The City of New York, through its Department of Parks and Recreation (the "Parks Department"), like the respondent Chicago Park District in the case at bar, has promulgated rules and regulations governing the use of the City's parks for special events or demonstrations. See Title 56 of the Rules of the City of New York ("RCNY"), § 1-01 et seq., as amended effective December 29, 1999. The regulations, inter alia, require permits for large assemblies (where 20 or more people are expected to attend) in New York City parks, in order to protect the public's use and enjoyment of the park, prevent the simultaneous use of a park by two groups, prevent chaos and disorder, and provide the City with advance notice so as to allow any needed alterations or supplementation of police, sanitation, emergency, health, or transportation services.

The regulations set time frames for submitting, processing, and responding to permit applications, 56 RCNY § 2-08(b); and enumerate five bases for denying a permit, 56 RCNY § 2-08(c). In the event that a permit is denied, the Parks Department is mandated to "employ reasonable efforts to offer the applicant suitable alternative locations and/or times and/or dates for the proposed event." 56 RCNY § 2-08(d). With respect to each of these bases for denial, the Parks Department makes reasonable efforts to accommodate an applicant at another suitable park site. These regulations are thus similar to those of the Chicago Park District at issue in the case at bar. See Chi. Park Dist. Code ch. VII § C(5)(e). The regulations are applied in an even-handed manner, based upon, inter alia, conflicts among permit applications for competing uses, or the effect of the proposed event on the park and surrounding area, or other objective content-neutral factors, rather than upon the message or viewpoint communicated at the event, or the content of the applicant's speech. The Parks Department has often denied permits to applicants with noncontroversial messages, due to the unsuitability of a particular location for the planned event, or its negative impact on others.

The denial of a permit application may be administratively appealed to the agency's designated appeals officer, and such appeal is subject to reasonable time limitations for both the applicant to file the appeal, and for the Parks Department to render a decision on the appeal. 56 RCNY § 2-08(e). New York City's permit requirements for holding demonstrations and special events in the City's parks are therefore similar to those of the Chicago Park District, which the Seventh Circuit upheld in the case at bar. See Chi. Park Dist. Code ch. VII, § C(6).

The Parks Department receives well over 2,000 special event permit applications per year. The Parks Department traditionally grants numerous permits for applicants engaging in First Amendment activities. Many of the applications granted for First Amendment activities communicate messages that some might deem controversial, but the applications are granted without regard to content or viewpoint. However, in many instances, applicants are requested to select another date and/or park location, due to prior requests by other applicants, the unsuitability of the location requested for the event, and/or unreasonable interference with use of the park by others.

For several years, various organizations apparently affiliated with the plaintiffs in the instant case, including but not limited to Cures Not Wars, Harm Reduction Coalition,

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any monetary contribution to the preparation or submission of this brief.

Fifth Avenue Pot Parade, Fifth Avenue Peace Parade, African Descendants Awareness Movement, Black Coalition on Drugs, End of the Drugs War Coalition, and Marijuana Day Parade, held a parade down Fifth Avenue in New York City, with a rally ending in Washington Square Park. Historically, this parade/rally has been held on the first Saturday in May. Different groups have marched different routes in different years for the parade portion of the event. In the mid 1990's, the May rally had caused increasing damage each year in Washington Square Park. As a result of the extensive damage and disruption that these rallies caused to Washington Square Park and the surrounding neighborhood, the Parks Department restricted the time and place of these events from year to year based on the unsuitability of various rally sites requested by these organizations. These restrictions imposed by the Parks Department have resulted in numerous lawsuits challenging the constitutionality of these restrictions. See, e.g., Harm Reduction Coalition v. Bratton, 1995 U.S. Dist. Lexis 6192 (S.D.N.Y. May 5, 1995); Cures Not Wars Coalition v. Stern, 96 Civ. 3139 (S.D.N.Y. 1996); Cures Not Wars Coalition v. Stern, Index No. 106972/97 (Sup. Ct. N.Y. County 1997).

Thereafter, in Beal and MacDonald v. Stern, 184 F.3d 117 (2d Cir. 1999), upon which petitioners herein rely (see Pet.'s Br. at 24), the United States Court of Appeals for the Second Circuit considered the plaintiffs' claims, on their appeal from the denial of a preliminary injunction, that the Parks Department's rules that were then in effect constituted a facially unconstitutional prior restraint on speech, and vested the Commissioner with unconstitutionally excessive discretion to grant or deny permits. Id. at 120, 122. The Second Circuit disagreed with the District Court's conclusion that the challenged regulations were content-neutral time, place and manner restrictions, finding instead that the rules constituted a prior restraint on speech because they conditioned the exercise of expressive activity on obtaining a

Parks Department permit. Id. at 124. In ruling that the regulations were a content-neutral prior restraint on speech, the Second Circuit determined that the challenged regulations needed to comply with only the first two procedural safeguards set forth in Freedman v. Maryland, 380 U.S. 51 (1965). Beal, 184 F.3d at 127-28, citing FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 229 (1990). The Second Circuit observed, inter alia, that "prompt access to judicial review in state courts would satisfy Freedman," and that there was some evidence in the record that such access was available, which would conceivably satisfy the second Freedman factor. Id. at 129. The Second Circuit, however, without expressing any opinion as to the facial validity of the rules under the First Amendment, remanded the case to the District Court for "amplification of the record" with evidence of the Parks Department's practices with respect to time limits on determining permit applications, and the availability of prompt judicial review. Id. at 129, 130.[2]

Some of these same plaintiffs similarly challenged, in both the Second and Seventh Circuits, the regulatory scheme governing the issuance of permits for parades and processions. See MacDonald v. Safir, 206 F.3d 183 (2d Cir. 2000), and MacDonald v. City of Chicago, 243 F.3d 1021 (7th Cir.), petition for cert. filed, __U.S.__ (June 11, 2001).

In MacDonald v. Safir, 206 F.3d 183, 186 (2d Cir. 2000), one of the plaintiffs in Beal challenged the facial constitutionality of New York City's parade permit

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[2] On March 27, 2001, a stipulation and order was entered in Beal and MacDonald v. Stern, withdrawing the case as moot in light of the amended Parks Department regulations, but leaving open the issue of attorneys' fees, and the possibility of a subsequent constitutional challenge to 56 RCNY § 2-08.

regulations, principally codified in New York City Administrative Code ("Admin. Code") § 10-110, and the Police Department's regulatory scheme governing the issuance of parade permits.[3] As in Beal, the Second Circuit, concluding that the parade permitting statute, Admin. Code § 10-110, constitutes a prior restraint on speech, remanded the case back to the District Court for further proceedings. Id. at 186, 190, 194. In finding that the ordinance was not sufficiently precise on its face to pass constitutional muster, the Court remanded the case to the District Court for submission of further evidence regarding the Police Commissioner's practices and guidelines with respect to issuing parade permits under Admin. Code § 10-110, to determine if the ordinance violated the First Amendment. Id. at 193.

The Second Circuit also remanded the case to the District Court for more evidence on whether the ordinance provides the necessary procedural safeguards required for prior restraints on speech, concluding that Admin. Code § 10-110 is a prior restraint on speech because one must obtain a permit before staging a parade in New York City. Id. at 194. With respect to the second Freedman safeguard requiring the availability of expeditious judicial review, the Court did not

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[3] On or about June 27, 2001, the City of New York, through its Police Department, promulgated Rules for Processions and Parades, in 38 RCNY §§ 19-01 through 19-04, which became effective on July 27, 2001. These regulations, inter alia, set forth procedures and time limits for filing and determining parade permit applications, and administrative appeals from permit denials. 38 RCNY §§ 19-03, 19-04. Specific guidelines and procedures for processing parade permit applications were also set forth in New York City Police Department Administrative Guide Procedure No. 321-14. These procedures are being revised to reflect the newly enacted regulations.

evaluate whether New York Civil Practice Law and Rules ("N.Y.C.P.L.R.") Article 78 proceedings[4] adequately satisfied that requirement, noting the limited evidence before it on that issue. Id. at 194-95. The Court further opined that if the Police Commissioner does not exercise discretion by passing judgment on the content of any protected speech, but only reviews general qualifications of each applicant, as a ministerial action, there may be no need for the Commissioner to bear the burden of going to court when a permit is denied. Id. at 195. The Second Circuit also remanded that claim for further fact-finding and evidence regarding the Commissioner's discretion in that regard under the ordinance. Id. The MacDonald case is still pending in the District Court, following the Second Circuit's remand.

Conversely, in MacDonald v. City of Chicago, 243 F.3d 1021, 1036 (7th Cir.), petition for cert. filed, __U.S.__ (June 11, 2001), the Seventh Circuit, applying the standard enunciated by this Court in Cox v. New Hampshire, 312 U.S. 569 (1941), concluded that Chicago's parade permitting ordinance was a content-neutral time, place and manner restriction, that was justified by its purpose, not its content; was narrowly tailored to serve a significant governmental interest; left open ample alternative channels of

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[4] The common-law writ of certiorari has been codified in New York State as a Civil Practice Law and Rules Article 78 proceeding. See N.Y.C.P.L.R. § 7801 et seq. ("Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained" in an Article 78 proceeding). An Article 78 proceeding is thus functionally similar to an action brought pursuant to the common law writ of certiorari, and provides an unsuccessful applicant with a forum in which to assert all constitutional challenges. Gasparo v. City of New York, 16 F. Supp. 2d 198, 211, 213 (E.D.N.Y. 1998); Graff v. City of Chicago, 9 F.3d 1309, 1325 (7th Cir. 1993) (en banc), cert. denied, 511 U.S. 1085 (1994).

communication; and did not vest the Commissioner with unfettered discretion or constitute an unconstitutional prior restraint on speech. As in Thomas, the Seventh Circuit in MacDonald rejected the plaintiffs' challenge to the constitutionality of the permit ordinance.

The City of New York thus has strong interests in this case, in light of the pending litigation in this jurisdiction, likewise involving some of the same plaintiffs and/or organizations, and similarly involving the constitutionality of the City's special event and parade permitting regulations, for demonstrations and special events in City parks, and parades and processions in City streets and roadways. The City of New York's special event and parade permit regulations are substantively and functionally similar in many relevant respects to those of the Chicago Park District that are being challenged in the case at bar, which the Seventh Circuit properly upheld as valid and constitutional. The City, like the Chicago Park District, has significant interests in reasonably regulating the time, place, and conduct of large special events in parks, and parades and processions in public streets, to avoid simultaneous incompatible events at the same location, as well as to minimize disruption, chaos, excessive noise, vehicular and pedestrian traffic hazards and obstructions, risk of injury to persons and damage to property, inconvenience to the neighboring community, and possible interference with the general public peace, safety and welfare. See New York City Charter § 533(a)(3); Administrative Code § 10-110; Title 38 RCNY §§ 19-01 et seq.; Title 56 RCNY §§ 1-01 et seq.

The City's permitting regulations and procedures, like those of the Chicago Park District, are content neutral and apply to all large public assemblies, with no consideration of the message or purpose of the group. They are narrowly tailored to meet the significant governmental interests in preserving City parks for legitimate park purposes, and offer alternative times or places if the special event applicant's

request is not feasible or available. The regulations do not vest unbridled discretion in the governmental agency, and are not an unconstitutional prior restraint of the content of any speech or message sought to be conveyed.

SUMMARY OF THE ARGUMENT

The Chicago Park District's special event permit regulations were properly upheld as valid time, place and manner restrictions. Unlike prior restraints, which are concerned with the content of the speech or message, and relate to censorship concerns, the regulations in issue do not forbid any speech, foreclose any communication, silence any speaker, or prohibit the dissemination of any message. Rather, the regulations impose a reasonable permit requirement for large special events in the city parks, simply narrowly regulating the time and place of the communication. The challenged ordinance does not authorize suppression of speech in advance of its communication, nor is it aimed at the suppression of speech because of its content.

The challenged regulations are content-neutral, in that they authorize denial of a permit on a variety of grounds that have nothing to do with the content of expressive activity; are narrowly tailored to serve significant governmental interests of park maintenance and preservation, and promoting public safety and convenience in encouraging the orderly use and enjoyment of whatever benefits the parks have to offer; and leave open ample alternative avenues of communication, by providing for alternative places and/or times for applicants who have been denied permits, thereby permitting expressive activity in the parks or elsewhere.

The permit regulations do not vest unbridled discretion in government officials, because they provide sufficiently objective identifiable standards, none of which are content-based, for the licensing authorities to apply in

determining whether to grant or deny a special event permit. The regulations contain narrow, objective and definite standards to guide the licensing authority, through application of uniform factors addressed to specific municipal interests, thereby avoiding the risk of censorship through use of unfettered discretion to deny permits as a means of suppressing a particular idea or viewpoint.

Even if the permitting regulations are analyzed as prior restraints, they are not unconstitutional, in that they provide for adequate procedural safeguards, by setting specific time periods within which the permit application must be granted or denied, and allowing for expeditious state court judicial review of that decision. Because the regulations in issue are not a censorship scheme, nor allow the city to pass judgment on the content of any protected speech, the licensor is not required to initiate court proceedings to justify a permit denial, or to bear the burden of proof in such proceeding. Rather, a limitation on the time to issue the permit, and the availability of prompt judicial review, satisfy Constitutional requirements.

ARGUMENT

POINT I

THE CHICAGO PARK DISTRICT'S PERMIT REGULATIONS WERE PROPERLY UPHELD AS REASONABLE AND VALID TIME, PLACE AND MANNER RESTRICTIONS, AND DO NOT CONSTITUTE PRIOR RESTRAINTS ON SPEECH.

The United States Court of Appeals for the Seventh Circuit properly upheld the constitutionality of the Chicago Park District's permit regulations as valid time, place and manner restrictions, rather than analyzing them as prior restraints. The Court correctly pointed out the "heterogeneity" of the prior restraint doctrine, noting that the "historical referent of 'prior restraints' is censorship, … which the administration of a park system does not much resemble." Thomas, 227 F.3d at 923-24. The Court in Thomas correctly observed that the challenged regulation does not authorize any judgment about the content of speeches or other expressive activity, nor does it even necessarily reduce the amount of speech. Id. Thus, the Chicago Park District's "regulation authorizes the denial of a permit on a variety of grounds, none of which has anything to do with the content of expressive activity." Id. at 924-25. Because the park permit ordinance does not concern itself with the content of the proposed speech, the Court in Thomas correctly treated the ordinance as a time, place and manner licensing system. Id. at 296; see also MacDonald v. City of Chicago, 243 F.3d at 1032 (in "a permit scheme which limits the discretion of the government based on content-neutral criteria … the threat of censorship characteristic of a prior restraint is remote"; the challenged ordinance does not prohibit anyone from marching and does

not restrict speech, but rather, regulates the time, place and manner of marches designed to present speech).

Recent decisions of this Court confirm that the permit regulations in issue are not "prior restraints." In Hill v Colorado, 530 U.S. 703 (2000), this Court construed a Colorado statute, which prohibited any person within 100 feet of a health care facility's entrance from knowingly approaching within eight feet of another person without that person's consent, in order to disseminate information or engage in oral protest, education or counseling, as a valid time, place and manner regulation that was content-neutral, narrowly tailored to serve significant and legitimate governmental interests, and left open ample alternative avenues of communication. Id. at 725-26. This Court rejected the petitioners' argument that the statute's consent requirement imposed an unconstitutional prior restraint on speech, noting that no channel of communication was foreclosed, no speaker was silenced, and no message was prohibited. Id. at 733-34. Rather than imposing a "heckler's veto," the statute allowed every speaker to freely engage in any form of expression communicating any message or viewpoint, narrowly restricting only the "place" of such communication. Id. at 734. This Court observed that concerns about "prior restraints" relate to restrictions imposed by "official censorship," and that this statute conferred no such broad censorial power on the pedestrian. Id. at 734 and n.43. Significantly, the ordinance did not restrict the content of any message that anyone might wish to communicate to anyone else, whether inside or outside the regulated areas. Id. at 708. Rather, the statute simply empowered citizens entering a health care facility to prevent a speaker, approaching from within eight feet, from communicating an unwanted message. Id. at 734. The law did not affect any other activity at any other location relating to any other person, and thus did not constitute an unlawful prior restraint. Id. at 734-35.

In Ward v. Rock Against Racism, 491 U.S. 781, 795 n.5 (1989), this Court rejected the dissent's suggestion that a sound amplification regulation for park events constituted a prior restraint, pointing out that the guideline granted no authority to forbid speech, but merely permitted the city to regulate volume to the extent necessary to avoid excessive noise. As the challenged sound amplification guideline did not authorize suppression of speech in advance of its expression, it did not constitute a prior restraint. Id., citing Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975).

Thus, the Chicago Park District's permit regulations were properly analyzed as a time, place and manner restriction, rather than as a prior restraint on speech. See Ward, 491 U.S. at 791; Madsen v. Women's Health Center Inc., 512 U.S. 753, 764 (1994) (the constitutionality of content-neutral, generally applicable statutes, as opposed to injunctive orders, is assessed under the standard set forth in Ward for a traditional public forum, requiring a determination of whether the time, place and manner regulations are narrowly tailored to serve a significant governmental interest); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 (1984) (regulation forbidding sleeping in public parks was defensible as a time, place or manner restriction or as a regulation of symbolic conduct); Cox v. New Hampshire, 312 U.S. 569 (1941) (upholding law requiring the issuance of a special permit for marching in public streets, not as a prior restraint, but as reasonable regulation of time, place and manner relative to other proper street uses); see also Blue Canary Corporation v. City of Milwaukee, 251 F.3d 1121, 1123 (7th Cir. 2001) ("prior restraints" that do not censor the dissemination of purportedly dangerous or offensive ideas or opinions, such as permit requirements on the use of public parks and other public spaces for expressive uses, including entertainment and political demonstrations, "are reviewed under the much more permissive standard applicable to

restrictions merely on the time, place and manner of expression"); United States v. Kistner, 68 F.3d 218, 221 n.7 and 222 (8th Cir. 1995) (upholding regulation and policy statement requiring permit for the sale or distribution of noncommercial printed material within public park areas as a reasonable time, place, and manner restriction under the First Amendment); United States v. Sued, 143 F. Supp. 2d 346 (S.D.N.Y. 2001) (regulations prohibiting engaging in a demonstration at Statue of Liberty without a public assembly or printed matter permit constitute reasonable restrictions on the time, place and manner of First Amendment expression at Liberty Island, and constitute a reasonable accommodation to the needs of many different users of Liberty Island).

Traditionally, the types of ordinances that this Court has held to be unconstitutional prior restraints have specifically focused on the content of the permit applicant's speech as a basis for denial. This Court has thus required procedural safeguards for prior restraints primarily where the statutes or conduct in issue were, in fact, content-based. See, e.g., Freedman v. Maryland, 380 U.S. 51 (1965) (statute mandated criminal penalties for showing movie without prior approval by a board of censors); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (denial of a permit to operate a musical in a municipal facility based upon the board member's judgment that the musical's content was inappropriate, and not "clean and healthful and culturally uplifting," constituted a prior restraint); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969) (city commission's absolute authority to deny a permit for a demonstration, parade or procession based upon the commission's belief that the event would negatively impact the public welfare, peace, safety, health, decency, good order, morals or convenience of its citizens, deemed a prior restraint); Cantwell v. Connecticut, 310 U.S. 296 (1940) (act proscribing the solicitation of money or any valuable thing for any alleged religious, charitable or philanthropic cause unless cause was

approved by the secretary of the public welfare council constituted a prior restraint); Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 759 (1988) (mayor's complete discretion in approving licenses for newsracks bases upon the terms and conditions deemed necessary and reasonable by the Mayor, constituted a prior restraint); Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 130, 133-34 (1992) (ordinance requiring permit and fee before authorizing public speaking, parades, or assemblies was a prior restraint on speech, where the ordinance allowed the possibility of censorship through uncontrolled discretion, by often requiring that the fee imposed be based upon the content of the speech, and such decision was "left to the whim of the administrator," without articulated standards or objective factors.); see also Blue Canary Corporation, 251 F.3d at 1123 (By 'prior restraint' Blackstone and modern courts alike mean censorship of the content of speech, which is an effort by administrative means to prevent the dissemination of ideas or opinions deemed to be dangerous or offensive); cf. 4 William Blackstone, Commentaries 151-52 (Tucker's Blackstone 1803).

Unlike the types of statutory schemes that have traditionally been deemed prior restraints, the regulatory provisions challenged by the plaintiffs in the instant case are not directed at the suppression of speech because of its content. The Chicago Park District's permitting scheme does not empower the Chicago Park District to appraise the content of the speech, exercise judgment, or form an opinion as to the message to be conveyed, as a basis for denying a permit. See Cantwell, 310 U.S. at 305.

As the Chicago Park District's permit regulations do not grant broad discretion to the permitting governmental officials and are content neutral, a licensing scheme that requires permits prior to organized expressive activity involving a large group of people in a public forum is not a

prior restraint. The municipality has a legitimate interest in protecting all individuals' use and enjoyment of its parks, avoiding the simultaneous use of the parks by two or more competing or incompatible groups, preventing chaos, disorder, and the risk of harm to people and property, and having notice in advance of an event so as to afford the government an opportunity for proper policing and other necessary services. See Clark, 468 U.S. at 293-98; Cox, 312 U.S. at 576; Ward, 481 U.S. 781.

Although plaintiffs' right to convey their message is certainly entitled to First Amendment protection, no constitutional right -- including those afforded by the First Amendment -- is absolute. The First Amendment does not guarantee the right to communicate one's views at all times and places, or in any manner that may be desired. Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981); Oliveri v. Ward, 801 F.2d 602, 605 (2d Cir. 1986), cert. denied, 480 U.S. 917 (1987); Million Youth March, Inc. v. Safir, 155 F.3d 124, 125 (2d Cir. 1998) (plaintiff seeking permit is not entitled to have court order city to issue permit for the event "precisely as the plaintiff wishes to hold it"). Thus, as this Court has repeatedly held, "even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" Ward, 491 U.S. at 791; see also Clark v. Community for Creative Non-Violence, 468 U.S. at 293, 297 (prohibition against camping, with ban on sleeping in certain parks, as a protest against homelessness, is a reasonable time, place and manner regulation that withstands constitutional scrutiny); Forsyth County, 505 U.S. at 130 ("any permit scheme controlling the time, place, and manner of speech must not be based on the content of the

message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication").

The challenged regulations here are content neutral, narrowly tailored, and leave open ample alternative avenues of communication. The Seventh Circuit correctly ruled in the case at bar that the Chicago Park District's regulations are content-neutral, in that they authorize denial of a permit on a variety of grounds, none of which has anything to do with the content of expressive activity. See Chi. Park Dist. Code ch. VII, § C(5)(e). Thomas, 227 F.3d at 924. Since the Chicago Park District's regulations make no distinction based upon the message of the applicant, and are "justified without reference to the content of the regulated speech," see City of Renton v Playtime Theatres, Inc., 475 U.S. 41, 47 (1986), the permit requirements are content neutral. See Ward, 491 U.S. at 792. They place no restrictions on, and do not prohibit, either a particular viewpoint or any subject matter. See Hill v. Colorado, 530 U.S. at 723.

The regulations are also "narrowly tailored to serve a significant governmental interest." See Ward, 491 U.S. at 796; Clark, 468 U.S. at 293. The government clearly has a substantial interest in controlling the activity around certain public and private places. See Hill, 530 U.S. at 728. The government may act to protect traditional public forums such as city streets and parks, to further its "substantial interest in ensuring the ability of its citizens to enjoy whatever benefits the city parks have to offer, from amplified music to silent meditation." Ward, 491 U.S. at 796, 797, citing Clark, 468 U.S. at 296. The permitting regulation "narrowly focuses on the Government's substantial interest in maintaining the parks ... in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence." Clark, 468 U.S. at 296. The Chicago Park District has a legitimate interest in ensuring that the parks within its

jurisdiction are adequately protected, see id. at 297, and its "interest in protecting the 'safety and convenience' of persons using a public forum is a valid governmental objective." Heffron, 452 U.S. at 650. Accord, Paulsen v. Gotbaum, 982 F.2d 825, 830 (2d Cir. 1992) (New York City park regulation limiting solicitation and leafletting to stationary area in park during a special event was upheld as a valid way to prevent litter, in light of "the substantial governmental interest in conserving parks"); United States v. Kistner, 68 F.3d at 221 (regulation requiring a permit for the distribution of printed matter had valid public purpose of avoiding overcrowding and overlapping activities, and preserving park facilities, resources, and the public peace and safety); ISKCON of Potomac, Inc. v. Kennedy, 61 F.3d 949, 957, 958 (D.C. Cir. 1995) (upholding prohibition of sale of religious beads and audio tapes on National Mall, noting that Park Service was free to determine how much commercial activity to permit in area parks "without significant erosion of their fundamental [park] purposes" and "without the sacrifice of essential park values").

The regulations allow the government to take into account the interests of various permit applicants, as well as the competing interests of other park users who may not wish to participate in the special event, and who may wish to engage in quiet and peaceful enjoyment of the park setting, or neighbors and community members near the park who may be disturbed by the excessive disruption and noise generated by the event. This Court has held that a city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986), and has characterized this interest as "important and substantial," Young v. American Mini Theatres, Inc., 427 U.S. 50, 80 (1976) (Powell, J., concurring), as is the government's interest in protecting its citizens from excessive noise, Ward, 491 U.S. at 797, and maintaining the parks in an attractive and intact

condition, Clark, 468 U.S. at 296. The validity of the regulations "does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted." Ward, 491 U.S. at 800 (citations omitted). The permit requirements must be assessed in light of the entire permitting scheme, and all the varied groups it regulates, and the regulation "is valid so long as the city could reasonably have determined that its interests overall would be served less effectively without the [regulation] than with it." See id. at 801. Thus, the narrow tailoring requirement is satisfied, where as here the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." Id. at 799.

Finally, the regulations leave open ample alternative avenues of communication. The regulations do not attempt to ban any particular manner or type of expression at a particular place or time. See Ward, 491 U.S. at 802. The regulations permit expressive activity in the parks, and have no effect on the quantity or content of that expression, beyond reasonably restricting the time and place of the special event. See id. The regulations clearly provide for alternatives for an applicant whose permit has been denied. Specifically, Chicago Park District Code ch. VII, § C(5)(e) states that "[n]otice of denial of an application for permit shall clearly set forth the grounds upon which the permit was denied and, where feasible, shall contain a proposal by the Park District for measures by which the applicant may cure any defects in the application for permit or otherwise procure a permit." In addition, where a prior permit application has been granted for a competing event, "the Park District shall propose an alternative place, if available for the same time, or an alternative time, if available for the same place." Id. The regulations in issue certainly leave open ample alternative channels of communication of any message sought to be

conveyed, whether in the city parks or elsewhere. See also Hill, 530 U.S. at 731, 734 (Colorado ordinance regulating speech-related conduct within 100 feet of the entrance of any health care facility did not "ban" any communication, but merely narrowly regulated the places where communications could occur); Ward, 491 U.S. at 799 n.7 (sound amplification guideline does not ban all concerts, or even all rock concerts, but instead eliminates excessive or inadequate sound amplification, without banning or restricting other speech); Clark, 468 U.S. at 295 (overnight sleeping prohibition in certain parks is a time, place or manner regulation which "neither attempts to ban sleeping generally nor to ban it everywhere in the parks"); Paulsen, 982 F.2d at 830 (rules did not bar soliciting or leafletting in parks, but simply restricted it to a certain area during a special event).

POINT II

THE PERMIT REGULATIONS DO NOT GIVE UNBRIDLED OR UNFETTERED DISCRETION TO THE LICENSING AUTHORITIES.

Petitioners contend that the permit regulations are facially invalid because they do not impose adequate standards, and grant too much discretion to the Chicago Park District to deny a permit, thereby posing the "danger of censorship" (Pet.'s Br. at 25-29, 40-44). The Seventh Circuit properly rejected this argument. The regulations do not vest undue discretion in the licensor because the regulations provide sufficiently objective standards for the licensing authorities to apply. While the standards are undoubtedly flexible, as the Seventh Circuit here recognized, and "the officials implementing them will exercise considerable discretion, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." Ward, 491 U.S. at 794, and cases cited therein. The

challenged regulations must be interpreted, by their own terms, to forbid municipal officials to deny a special event permit, or to fail to offer alternative times and/or locations, based on the message sought to be conveyed by the applicant. See Ward, 491 U.S. at 794-95. The regulations are thus not vulnerable to petitioners' facial challenge. See id. at 795.

This Court has reiterated that a licensing scheme that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 225-26 (1990), citing Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 757 (1988). A law which places time, place and manner restrictions on expressive activity through a licensing requirement must contain "narrow, objective, and definite standards to guide the licensing authority," to avoid the risk of censorship, through use of unfettered discretion as a means of suppressing a particular viewpoint. See Shuttlesworth, 394 U.S. at 150-51; Forsyth County, 505 U.S. at 130-31. A facial challenge will be upheld "whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." Lakewood, 486 U.S. at 759 (1988) (holding that a statute inadequately limited official discretion when the mayor was permitted to deny a license for "such other terms and conditions deemed necessary and reasonable by the Mayor"). In other words, a regulation that allows "arbitrary application" is "'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'" Forsyth County, 505 U.S. at 130.

Permitting regulations such as those challenged here do not vest unfettered discretion in licensing authorities, because they require the application of uniform factors with reference to well-recognized municipal interests, such as park

preservation, public safety concerns, and the balancing of competing and simultaneous park uses and special events for the greatest public use and enjoyment, and the least disruption and interference with other park or neighborhood uses. Chicago Park District Code ch. VII, § C(5)(e)(1)-(11) contains ample specific and objective criteria for evaluating permit applications, thus effectively avoiding the problem of "unbridled discretion" that this Court condemned in Lakewood. See, also Shuttlesworth, 394 U.S. at 154-55 (statute in question was construed to include reasonable standards); Cox, 312 U.S. at 576 (upholding parade permitting scheme which gave the licensing board the power to investigate the application and revoke the license, but was silent as to the criteria governing the granting of permits); Ward, 491 U.S. at 793-94 (rejecting facial challenge to the Parks Department's Use Guidelines for sound amplification, and rejecting plaintiff's claim that the Use Guidelines vested "unbridled discretion" in the hands of the city officials); Graff v. City of Chicago, 9 F.3d 1309, 1317-18 (7th Cir. 1993) (en banc), cert. denied, 511 U.S. 1085 (1994) (city officials may constitutionally employ limited [but not unbridled] discretion when considering permit or license applications); United States v. Kistner, 68 F.3d at 221 (park permit regulation allowing consideration of effect on public health, safety and welfare did not vest unbridled discretion); Stonewall Union v. City of Columbus, 931 F.2d 1130, 1135 (6th Cir.), cert. denied, 502 U.S. 899 (1991) (eleven criteria regarding parade route and size to determine fee "constitute objective and definite standards related to traffic control to guide the licensing authority and prevent unfettered discretion"); Turley v. Police Department, 167 F.3d 757 (2d Cir. 1999) (upholding constitutionality of statute regulating sound amplification and use of sound devices in public places, concluding that the ordinance did not confer impermissible discretion on police officers to determine the maximum volume for sound permits, since the articulated guidelines and policies adopted by the City met constitutional requirements).

Any regulation or requirement, no matter how objective and specific, requires some application of facts to the specified criteria. The Constitution seeks to prevent only "unfettered" or "unbridled" discretion. See, e.g., Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) ("Condemned to the use of words, we can never expect mathematical certainty in our language"). Where as here there are objective criteria by which to measure and guide the decisionmaker's actions, there is no "unfettered discretion." The Chicago Park District's permitting regulations are constitutional, in that they provide adequate objective criteria to evaluate permit applications in a content-neutral manner, and are constrained by articulated standards to guide the exercise of discretion. Thus, the regulations do not pose a real or substantial threat of censorship. See Ward, 491 U.S. at 794-95. Nor is there any evidence whatsoever that content has anything to do with the Chicago Park District's assessment of special event permit applications. See MacDonald, 243 F.3d at 1033. The Chicago Park District's exercise of discretion in this particular context, like all exercises of agency discretion, is subject to the legal requirement that the agency not act arbitrarily or capriciously. See Shuttlesworth, 394 U.S. at 154-55.

Unlike the ordinances that were struck down in Forsyth County, 505 U.S. at 133, and Lakewood, 486 U.S. at 769-70, in which the licensing authorities relied on subjective criteria in determining whether speech would be restricted, and in Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 798, 801 (1988), in which the licensors had the discretion to affect the content of the fundraisers' speech, regulations such as those at issue here lack any content-based consideration, and do not vest government officials with undue discretion to grant or deny permits. Thus, these regulations do not give unbridled discretion to licensing authorities, and are constitutional on their face, in that they do not implement subjective factors

that cannot be objectively verified or subjected to judicial review. See Forsyth, 505 U.S. at 133; Lakewood, 486 U.S. at 758. As in Ward, the challenged regulations are not vulnerable to petitioners' facial challenge.

POINT III

EVEN IF ANALYZED AS A PRIOR RESTRAINT, THE PERMITTING SCHEME IS VALID AND CONSTITUTIONAL, IN THAT IT PROVIDES ADEQUATE PROCEDURAL SAFEGUARDS TO PROTECT APPLICANTS' FIRST AMENDMENT RIGHTS.

Petitioners argue that the permitting scheme is an unconstitutional prior restraint, because it fails to provide for two of the three required procedural safeguards mandated by Freedman v. Maryland, 380 U.S. 51, 58-60 (1965). They contend that the regulations fail to provide for a prompt judicial determination, and fail to require the government to bear the burden of initiating judicial review, and to bear the burden of proof in the judicial review proceeding in Court (Pet.'s Br. at 30-42). They argue that prompt judicial review must include the requirement for a prompt decision (Pet.'s Br. at 33), and that the government must be required, at a minimum, to establish "a prima facie case supporting the denial of speech" (Pet.'s Br. at 35). The Seventh Circuit, however, correctly rejected this approach, and properly sustained, as constitutionally valid, the adequacy and pace of the available judicial review procedures. As the Court below concluded, the regulations in issue are not a form of censorship, in that they provide for no evaluation or assessment of the content or message sought to be conveyed, and the denial of permits does not relate to controversial or unpopular expression. See Thomas, 227 F.3d at 926, 928.

The Court below also correctly declined to require the Chicago Park District to seek judicial review of its own action each time it denies a permit, opining that Freedman v. Maryland restricts the judicially unauthorized regulation of the content of speech, and does not apply to time, place, and manner licensing provisions. Thomas, 227 F.3d at 926.

In Freedman v. Maryland, this Court determined that "to obviate the dangers of a censorship system," the following three procedural safeguards for such prior restraints should be implemented to ensure expeditious decisionmaking:

> (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.

FW/PBS, Inc. v. City of Dallas, 493 U.S. at 227, citing Freedman v. Maryland, 380 U.S. at 58-60. In FW/PBS, this Court applied some of the Freedman standards to a municipal ordinance which conditioned the operation of sexually oriented businesses on receipt of a license. See FW/PBS, Inc., 493 U.S. at 220-21; City News and Novelty, Inc. v. City of Waukesha, 531 U.S. 278 (2001).

This Court in FW/PBS, Inc. concluded that because the licensing scheme there did not present the grave "dangers of a censorship system," as occurred in Freedman, the full procedural protections required by that case were not necessary. FW/PBS, Inc., 493 U.S. at 228. Thus, the Court invoked the first two procedural safeguards as "essential," requiring (1) specified and reasonable time periods within

which the licensor must make the decision whether to issue the license, and (2) "the possibility of prompt judicial review in the event that the license is erroneously denied." Id. In concluding that the First Amendment does not require the government to bear the burden of going to court to effect the denial of a license application, or to bear the burden of proof in court, this Court noted that the licensing ordinance at issue in FW/PBS was significantly different from the censorship scheme in Freedman, where the censor engaged in direct censorship of particular expressive material. Id. at 229, 230. Unlike in Freedman, the Dallas ordinance in FW/PBS did not contemplate the city exercising discretion by passing judgment on the content of any protected speech, but rather, involved only a general review of each license application, which was a presumptively constitutional ministerial action. Id. at 229.

The permitting scheme at issue here likewise does not involve direct censorship of particular expressive material, nor the exercise of discretion by passing judgment on the content of any protected speech. Rather, as in FW/PBS, Inc., the Chicago Park District's review of special event permit applications is not presumptively unconstitutional, and the Chicago Park District is not required to initiate court proceedings to support a license denial, or to bear the burden of proof in that proceeding, as in the type of censorship scheme that was challenged in Freedman. Rather, a limitation on the time to issue the permit, and the availability of prompt judicial review, satisfy Constitutional requirements. See FW/PBS, Inc., 493 U.S. at 230; see also MacDonald, 243 F.3d at 1035-36 (recognizing legal and practical distinction between a censorship and a content-neutral licensing scheme, in holding that under rationale of FW/PBS, a content-neutral licensing or permit ordinance need not include a provision requiring the government to bear the burden of going to court to deny a permit); accord, Beal and MacDonald v. Stern, 184 F.3d at 128 (park permit ordinance, deemed to be a content-

neutral prior restraint, needed to comply with only first two Freedman procedural safeguards); MacDonald v. Safir, 206 F.3d at 195 (if the Police Commissioner does not in fact exercise discretion by passing judgment on the content of any protected speech, there may be no need for the Commissioner to bear the burden of going to court to justify the denial of a permit).

With respect to the third requirement of "prompt judicial review," the Circuit Courts have divided over whether this requirement encompasses a prompt judicial determination on the merits of the permit denial, or whether prompt access to court review is sufficient. See City News and Novelty, Inc., 531 U.S. 278, and cases cited therein. The City of New York respectfully urges this Court to adopt the reasoning of the First, Fifth, Seventh, and Eleventh Circuits, in holding that for content-neutral permit and licensing ordinances, the requirement of "prompt judicial review" is satisfied by access to prompt judicial review, and need not include a "deadlined" judicial determination on the merits of the permit denial. See MacDonald, 243 F.3d at 1035, and cases cited therein. Indeed, as the Seventh Circuit here recognized, the cases holding that judicial review of permit denials must have time limits all involved special licensing schemes for sexually oriented businesses, based upon this Court's censorship decisions, as in Freedman, or quasi-censorship rulings, as in FW/PBS, Inc. See Thomas, 227 F.3d at 927, and cases cited therein.

While Freedman requires prompt judicial resolution of censorship decisions, access to prompt judicial review is sufficient for permit and licensing decisions. See, e.g., Boss Capital, Inc. v. City of Casselberry, 187 F.3d 1251, 1256 (11th Cir. 1999), cert. denied, 529 U.S. 1020 (2000). Licensing decisions are markedly different from censorship decisions, in that censors pass judgment on the content of expression, whereas licensing officials examine more mundane and

ministerial factors in deciding whether to issue a license or permit. Id. The need for a prompt judicial decision is thus far less compelling for licensing ordinances such as the special event permit regulations at issue here, than for censorship schemes. Because this case involves a permit regulation that is not a form of censorship, and does not require an evaluation of the content or the message of the regulated activity, access to prompt judicial review through State court common law certiorari proceedings passes constitutional muster. See MacDonald, 243 F.3d at 1035. Access to prompt judicial review is sufficient for licensing ordinances. See Boss Capital, Inc., 187 F.3d at 1256-57.

Accordingly, for all the above reasons, the City of New York respectfully urges this Court to affirm the judgment of the Seventh Circuit, recognizing that licensing ordinances and permit regulations such as those at issue in this case, that are routinely imposed to reasonably regulate the use of public parks and other public spaces for expressive and non-expressive uses, are reasonable and valid time, place and manner restrictions, and are not unconstitutional prior restraints, nor subject to the procedural safeguards applicable to censorship schemes that are aimed at affecting or preventing dissemination of the particular viewpoint, or prohibiting the content of the speech or message sought to be conveyed. The Chicago Park District's special event permitting regulations, like those in effect for the City of New York, are narrowly tailored to serve substantial and content-neutral governmental interests of ensuring the adequate protection and conservation of the public parks, maintaining park property, and furthering public safety and convenience in allowing the orderly and/or quiet use and enjoyment of the parks by all who wish to avail themselves of whatever opportunities, activities, or other attractions the parks may offer to individuals and groups. See Ward, 491 U.S. at 803; Clark 468 U.S. at 296-97, 298, 299. The regulations also leave open ample channels of communication. Accordingly,

they were properly upheld as valid under the First Amendment as reasonable time, place and manner regulations, and are not susceptible of invalidation, either in a facial challenge because they do not vest unbridled discretion in government officials, or as an unconstitutional prior restraint of the content of any expression. See Ward, 491 U.S. at 781. "Reasonable time, place or manner restrictions are valid even though they directly limit oral or written expression." Clark, 468 U.S. at 298 n.8. A regulation of the time, place or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests, but it need not be the least restrictive or least intrusive means of effecting those interests. Hill, 530 U.S. at 726; Ward, 491 U.S. at 798.

CONCLUSION

FOR ALL THE ABOVE REASONS, THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT SHOULD BE AFFIRMED.

Respectfully submitted,

MICHAEL D. HESS,
Corporation Counsel,
Attorney for the Amicus Curiae
City of New York,
100 Church Street,
New York, New York 10007.

LEONARD J. KOERNER,*
ELIZABETH I. FREEDMAN,
VIRGINIA WATERS,
of Counsel.

*Counsel of Record